No. 12662

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH DENUNZIO FRUIT COMPANY, a corporation,
Appellant and Cross-Appellee,

vs.

RAYMOND M. CRANE, doing business as Associated Fruit Distributors,
Appellee and Cross-Appellant,

JOHN C. KAZANJIAN, doing business as Red Lion Packing Company, a corporation,
Appellee.

APPELLEE CRANE'S BRIEF.

HENRY O. WACKERBARTH,
601 Fay Building, Los Angeles 13, California,
Attorney for Appellee Raymond M. Crane, Doing Business as Associated Fruit Distributors of California.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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APPELLEE CRANE'S BRIEF.

The transaction between the parties herein arose out of certain telegrams and teletype conversations. Therefore there can be no dispute as to the facts. There is, however, a great dispute as to the application of the law to the undisputed facts.

In Denunzio's brief he seeks to avoid the ruling of Judge Carter to the effect that the contract sued upon is illegal.

Before answering Denunzio's argument it seems fitting to declare the position taken by Crane with reference to the transaction between the parties. Crane took the position before the Department of Agriculture and before

Judge O'Connor that he was a buying broker and, therefore, agent for Denunzio and that he could not be held liable for failure of Kazanjian to ship the grapes in question. An examination of the petition of Crane setting forth the grounds upon which he relies to defeat the claim of Denunzio [Tr. pp. 12 *et seq.*] will disclose that Crane did not assert the illegality of contract before the Secretary of Agriculture, but defended upon the ground that he was the agent of the purchaser and not liable for the default of the seller.

This same position was taken before Judge O'Connor on appeal in a trial *de novo*. However, during the course of the trial in the District Court, Judge O'Connor announced that he would not accept the position taken by Crane that he was the agent of the buyer—but that the Court would find that Crane was the agent of Kazanjian, the seller of the merchandise. It was when Judge O'Connor took the position that Crane was the agent of the seller, and not before, that Crane then asserted the illegality of the contract, contending that if he was the agent for the seller, then the payment by Denunzio of the full ceiling price to the seller, Kazanjian, together with the payment of a commission to the agent for the seller resulted in the contract becoming void, being in violation of the Maximum Price Regulations issued pursuant to the Emergency Price Control Act of 1942. (U. S. C. A. Title 50 App.)

We fully realize that in asserting illegality of contract we are attacking a transaction in which Crane was the moving party. We feel that the interpretation to be put upon the facts of this case, as contended for by Crane, presented a valid contract and that the illegality arose

only when he was removed from the status of a buying broker and placed on the other side—that is as broker for the seller.

In this brief we will answer the various points presented by appellant Denunzio.

Answer to Point I.

Under this point Denunzio contends that the applicable maximum ceiling price is $2.53, not $2.50.

Denunzio in his brief states "Judge O'Connor in his Findings found the applicable maximum ceiling to be $2.53 per lug. [Finding II, Tr. p. 140.]"

This is not true. Judge O'Connor's finding in this regard was as to "The Contract" and he finds as to the contents of the September 26th telegram by Crane to Rains. The statement "The shipper to pay all storage charges, at a price of $2.53 per lug net to shipper, which was ceiling price at that time, * * *" is a statement taken from Crane's telegram of September 26th to Rains. [See Tr. p. 202 for the telegram.] Judge O'Connor did not make a Finding of Fact or Conclusion of Law to the effect that the ceiling was $2.53.

Denunzio next states: "Judge Carter, on the other hand, in his opinion, held the applicable maximum ceiling price to be $2.50 per lug [Tr. p. 166]."

Judge Carter adopted, without change, the findings of fact made by Judge O'Connor, and at no place is there a finding as to what the ceiling price was. Judge Carter in his conclusions of law [Tr. p. 177, Par. IV] concludes that the "combined consideration amounting to approximately $2.54 per lug, exceeded the price ceiling of $2.50 per lug in effect at the time said sale was to take place,

said ceiling having been established by Maximum Price Regulation #426," etc.

The question as to what was the proper ceiling is a question of law and not one of fact. It involves the interpretation of MPR 426. Judge Carter took judicial notice of the ceiling price. For authorities sustaining this position see 44 U. S. C. A., Section 307, also case of *Miller v. Long-Bell Lumber Co.* (1949, Texas), 222 S. W. 2d page 244 and cases there cited.

Denunzio in his brief thereupon argues that if the ceiling price was $2.50 per lug, then the added procurement charge of $50.00 per car would, of necessity, make the total price over the legal ceiling and the illegality would be apparent on the face of the contract, but if the ceiling price was $2.53 per lug, then the contract price of $2.50 per lug plus the procurement charge of $50.00 per car, would not be illegal on its face, and it would be incumbent on the party contending such illegality to raise the question by an affirmative defense. This argument will be answered in reply to Point III where this point is argued by Denunzio.

Denunzio thereupon proceeds to point out that in the case at bar the ceiling price was $2.40 plus a 13¢ markup, making a total of $2.53. We do not believe MPR 426, Amendment 46 (Fed. Reg. 1944, pp. 9509-10-11) justifies this conclusion.

Amendment 46 to MPR 426, Table 2, deals with "Maximum prices for table grapes." Items 3 to 6, column 1, and the corresponding references to column 2, refer to table grapes produced in areas in California other than Riverside and Imperial Counties, with a net lug weight of 28 pounds or more. The grapes in question were produced in Tulare County, California.

Column 3 refers to sales by lugs and column 4 refers to seasons. Under the season from December 11th to the end of the season, by use of column 5, we find the maximum price to be $2.40. Denunzio concedes this much. (We respectfully request this Court to examine the tables shown on pages 9509-10-11 of the 1944 Federal Register to more easily determine the price ceilings.)

Denunzio falls in error in interpreting Table A found on page 9511 of the Federal Register.

The first set of figures, columns 1, 2 and 3 of this table refer to table grapes produced in Riverside and Imperial Counties of California and in Arizona, and the second set of figures refers to "all other areas" (Items 3 to 10, table 2) and refers to lug boxes containing net weight of 28 pounds or more. Column 4 establishes a markup which Kazanjian (a grower-packer) could make if sold "Through a broker in any quantity or through a commission merchant in carlots or trucklots." The markup is 3¢. Columns 5, 6 and 7 do not apply to the case at bar as they refer to sales in less than carlots.

Columns 8 to 12 of Table A refer to "Sales by any person (including grower-packers) through a grower's sales agent and sales by shipping point distributors."

If the sale in question is considered to be a direct sale made by Crane, as a shipping point distributor (both Judge O'Connor and Judge Carter found Crane to be "a broker or carlot distributor" [Tr. pp. 139 and 171], without the use of a broker or any other agent, then Crane's

ceiling price would be the $2.40 (base as shown by Table 2) plus a 10¢ markup, as shown by column 8 of Table A.

It will be remembered that Kazanjian was a grower-packer. [Judge O'Connor's Findings of Fact, Par. I, sub. 2, Tr. p. 140.] Judge Carter makes the same finding. [Tr. p. 172, Par. I, sub. 2.]

If the sale was made by Kazanjian "through a broker or salaried representative" then the markup would be 13¢ over and above the $2.40 base.

It must be conceded that upon the record Kazanjian was not paying Crane for making the sale, as Crane was looking to the buyer for his commission. Therefore the sale could not have been made by Kazanjian as a grower-packer through a broker to whom he was paying a commission, or a salaried representative, but the sale was made by Kazanjian as a direct sale without the use by him of a broker (that is—paid broker) or any other agent (that is—paid agent) and the markup was therefore 10¢ a lug under column 8 and not 13¢ under column 9.

The use of the words "salaried representative" in the heading shows that a sale under column 9 refers to one in which the grower-packer is put to some expense (salary of salaried representative) and it would appear that the word "broker" means a broker being paid by the grower-packer. The very purpose of granting the markup is to take care of selling expense. The heading at the top of Table A bears out this argument. It reads "Maximum Markups for *Distributive services performed by*

Growers-Packers, Shipping Point Distributors, *and their Agents, to be added to the Applicable Maximum price.* * * *" (Italics added.) The markup under column 9 would be to permit the Seller to recover his ceiling plus his selling expense. If, as here, there was no selling expense to Kazanjian for Crane's services, then there is no justification for the 13¢ markup.

It seems to us that the ceiling price of Kazanjian's sale should be governed by column 4 providing for a 3¢ markup or column 8 providing for a 10¢ markup.

MPR 426, Table 2, establishes a base ceiling from November 1 to December 10 as $2.10, and from December 11 to the end of the season as $2.40. Crane's telegram of September 26 [Tr. p. 202] states: "Shipper to Trans Title on or after December 10th." If the December 10th base ceiling applied it would be $2.10. If the December 11th base ceiling applied it would be $2.40. We have presented this analysis of MPR 426 predicated upon the assumption that the base ceiling of $2.40 applied. If the base price of $2.10 applied there would, of course, be a greater excess over the ceiling.

Denunzio is clearly in error in contended that the ceiling price was $2.53 instead of $2.50.

In view of these different markups, it was incumbent upon the trial court to first determine the status of each of the parties, and second to determine whether the sale was made as a direct sale by Kazanjian or a sale by Kazanjian through a paid broker or salaried representative.

Answer to Point II.

We have no dispute with the contention urged under this point to the effect that a contract is presumed to be lawful. This presumption stands until the contrary is shown.

Answer to Point III.

Under this point Denunzio contends that no illegality appears on the face of the contract and therefore it was incumbent upon respondent to allege and prove illegality.

Our answer to this contention is threefold, viz.:

(a) Invalidity was alleged.

(b) The case was tried on the theory that the contract in question was illegal.

(c) Whenever illegality appears it becomes the duty of the Court to refuse to entertain the action.

(a) Invalidity Was Alleged.

In paragraph 4 of complainant's amended complaint, it alleges the entering into the contract by Crane, acting as principal, or as agent for Kazanjian, or as both. [Tr. p. 18.]

In Crane's answer allegation 4 is denied. The answer continues: "This allegation is further denied for the reason that no valid contract was entered into" and after alleging certain steps with reference to the negotiations Crane alleges "it is denied that any valid, enforceable contract was consummated." Thereafter Crane alleged: "Pursuant to the denial of the existence of any valid, enforceable contract of sale, allegations 5, 6 and 7 are denied." These allegations deal with the parties negotiating the contract, the delivery of a standard memoran-

dum of sale and the contents thereof and the failure to ship. Crane further alleged: "Allegation 9 is denied in that no valid contract of sale was entered into for reasons previously outlined in this answer." [Tr. pp. 49-50.]

In the case of *Chadwick v. Chadwick,* 95 Cal. App. 690-9, 273 Pac. 86, the Court stated:

> "* * * an instrument may be invalid, simply because, in the interests of society, the legislature has prohibited the making or entering into the same."

Clearly these allegations were sufficient to put in issue the question of legality.

(b) The Case Was Tried on the Theory That the Contract in Question Was Illegal.

While the transcript of record does not show the evidence of illegality that was offered and the objections made thereto, still the fact that such a defense was litigated is shown by the memorandum opinion of Judge O'Connor.

In Judge O'Connor's memorandum decision we find the following heading: "Contention of Raymond M. Crane that the contract is *invalid:*" Under this heading Judge O'Connor states: "The said Raymond M. Crane however, contends that even assuming there was a meeting of the minds, or an offer and acceptance, the contract is unenforceable *inter alia,* for the reasons that (1) * * * (2) * * * (3) the provision for a $50.00 per car procurement charge to Raymond M. Crane, bringing the total cost of the grapes over the Maximum Price Regulation 426, issued by the Office of Price Administration, *vitiated the contract ab initio.*" [Tr. pp. 101-102.] (Italics added.)

Later in Judge O'Connor's opinion we find the following:

> "Raymond M. Crane, while he believed that the procurement charge of $50 a car was legal during the contract negotiations (note 10), took the position for the first time in this court that because he agreed to accept a procurement charge of $50 a car on each of the three cars of grapes sold, acceded to by A. B. Rains, Jr., in behalf of Joseph Denunzio, which concededly increased the cost thereof to Joseph Denunzio over Maximum Price Regulation 426, * * * the contract became illegal and void *ab initio;* and, therefore, unenforceable as against the public policy. Counsel for Joseph Denunzio contended the evidence was inadmissible before this court because the point had not been presented to and ruled upon by the trial examiner and the Secretary of Agriculture.
>
> In appellate proceedings evidence *aliunde* or *de hors* the records is usually inadmissible and counsel are confined to the record in the court below, but under the statute under which this case is being appealed, this is a trial *de novo* and therefore new evidence is admissible.
>
> *The court permitted both sides to file additional briefs on the illegality of contracts alleged to be contrary to public policy, and has considered the point raised, which is the most difficult one in the entire case."* (Italics added.) [Tr. pp. 120-121.]

While Judge O'Connor stated that Crane, having been the prime mover in soliciting the brokerage in the first instance "does not stand before the court in very good grace," still it must be remembered that it was only when the trial court took the position that Crane was not a

buying broker or agent for the buyer but was the agent for the seller (Kazanjian) that Crane urged this contention. The question of illegality was discussed by Judge O'Connor in his opinion from page 120 in the transcript to page 129.

In Judge O'Connor's conclusions of law he concluded as follows:

> "7. The contract providing for the sale of grapes at $2.50 per lug is a legal and valid contract and is enforceable." [Tr. p. 150.]

There can be no question but what this case was defended upon the additional theory that the contract was illegal, and it is therefore too late for appellant to now contend that the illegality should have been alleged and proved.

In the case of *Grimes v. Nicholson,* 71 Cal. App. 2d 538, 162 P. 2d 934, the Court laid down the rule as follows:

> "When a cause is tried and evidence introduced on the theory that a material issue has been raised by the pleadings and the court renders judgment on that theory, the parties will not be allowed to say for the first time on appeal that there was no such issue."

This rule of law is sustained by the following additional cases:

Schroeder v. Mauzy, 16 Cal. App. 443, 447 (118 Pac. 459);

Sprigg v. Barber, 122 Cal. 573, 579 (55 Pac. 419);

Illinois T. & S. Bank v. Pacific Ry. Co., 115 Cal. 285, 297 (47 Pac. 60);

National Union Fire Ins. Co. v. Nason, 21 Cal. App. 297, 299 (131 Pac. 755).

(c) Whenever Illegality Appears It Becomes the Duty of the Court to Refuse to Entertain the Action.

In the course of the trial, in response to the trial court's announcement that he would hold Crane to be the agent for Kazanjian, counsel for Crane urged the contention that if Crane was the agent of Kazanjian, then the payment to Kazanjian of the ceiling price and the payment to Crane, as agent of Kazanjian, of $50.00 a car made the contract illegal and unenforceable.

The rule in this regard is set forth in 6 Cal. Jur. 162, Sec. 112, as follows:

> "Where the defendant does not set up the defense of illegality, but such illegality appears from the case as made by either the plaintiff or the defendant, it becomes the duty of the court *sua sponte* to refuse to entertain the action."

Substantially the same statement is found in the opinion of the Court in the case of *Dean v. McNerney,* 91 Cal. App. 206, 266 Pac. 975.

The foregoing rule is supported by the following cases:

Endicott v. Rosenthal, 216 Cal. 721, 16 P. 2d 673;
Morey v. Paladini, 187 Cal. 727, 203 Pac. 760.

Illegality appearing from the evidence, it was incumbent on the trial court to determine this issue.

(d) Cases Relied Upon by Appellant.

In the case of *Bernard v. Sloan,* 2 Cal. App. 737, 84 Pac. 232, defendant contended "that the only purpose and con-

sideration" for the contract was an agreement in restraint of trade and therefore the contract was illegal and void. This defense was not considered or sustained by the trial court and the appellate court refused to consider it.

The *Grimes v. Nicholson case,* 71 Cal. App. 2d 538, 162 P. 2d 934, was an action to recover for services performed and equipment used in carrying out a contract to install certain electrical equipment. Counsel contended that the contract, if entered into, was illegal because it was in violation of certain regulations of the Office of Price Administrator. The court held that appellant failed to prove facts showing the invalidity and that the burden of proof was on appellant. The case was tried on the theory that certain O.P.A. regulations applied. On appeal appellant conceded that they did not apply but asked the appellate court to consider other O.P.A. regulations as affecting the contract. The appellate court refused this request, stating:

> "The law is well settled in this state that 'an appellate court will not consider a theory of a case different from that urged in the trial court and which is presented for the first time on appeal.' "

This case clearly has no bearing on the questions involved in this appeal.

The case of *Gelb v. Benjamin,* 78 Cal. App. 2d 881, 178 P. 2d 476, is one where plaintiff sought to recover a bonus which he claimed defendant agreed to pay him on the amount of business he did for defendant over a certain amount. The agreement was made some months before the O.P.A. regulations freezing salaries. This defense was

"raised for the first time on appeal and it was in no way pleaded or presented in the trial court." The Court stated:

> "The price control regulations relied on contain a number of exceptions, and no evidence having been received in this connection there is no evidence to indicate in any way that the facts of this case did not come within one or more of these exceptions. From a reading of these regulations it cannot certainly be said that any approval was necessary here."

The statement of the Court: "Under such circumstances, illegality is an affirmative defense that must be specially pleaded," is clearly dicta. The point was decided on the insufficiency of the record to show affirmatively that the O.P.A. regulations applied.

In the case at bar the issue of illegality was tried and determined by the trial court.

The case of *Bernstein v. Downs,* 112 Cal. 197, 44 Pac. 557 (referred to by the Court in the *Gelb-Benjamin* case) is one wherein a question was presented as to whether the work contracted to be done could be legally performed. The Court stated:

> "The extra work contracted for was not within the enumeration of acts prohibited by the said section of the Penal Code; it was clearly not malicious; the facts show that the trustees permitted it; and, as the facts averred do not state an unlawful contract, its unlawfulness, if any, was a matter of defense."

The *Bernstein-Downs* case is of no help to appellant as the defense of illegality was tried by the trial court.

Answer to Point IV.

Under this point Denunzio contends that no evidence was introduced as to the illegality of the contract and he argues that no illegality is shown on the face of the contract, nor has an affirmative defense of illegality been raised by amended answer, nor by the evidence. Denunzio then states that the only evidence of the number of lug boxes in a carload of Emperor grapes is the evidence of the number of lugs that went into the three replacement cars, that one replacement car contained 1100 lugs and each of the other two replacement cars contained 1105 lugs. He then states that if the Court is willing to assume that the three cars to be supplied by Crane were each to contain 1100 lugs, this would make the commission to Crane amount to approximately 4½¢ a lug and he further states that he does not believe that the Court would be justified in making this assumption if the result would be to declare the whole contract null and void.

In the "Statement of Points on which Appellant Joseph Denunzio Fruit Company Intends to Rely" [Tr. p. 259, *et seq.*] there is no statement to the effect that Denunzio intends to raise the question of lack of evidence as to the number of lugs of Emperor grapes in a standard car as the basis of an attack on the holding of illegality.

In order to question the Conclusion of Judge Carter [Tr. p. 177] to the effect that the combined consideration amounting to approximately $2.54 per lug, exceeded the price ceiling of $2.50 per lug in effect at the time said sale was to take place, it was incumbent upon Denunzio to insert this contention in his statement of Points and request that all the material evidence on this question be printed in the Transcript of Record.

We realize that Rule 19, Subd. 6 of the Rules of this Court provides that "If at the hearing it shall appear that any material part of the record has not been printed, the appeal may be dismissed, or such other order made as the circumstances may appear to the court to require." However, it is not our disposition to ask the Court to dismiss the appeal or to disregard the argument urged by Denunzio under Point IV. We choose to argue this point on its merits and therefore we have set forth in an appendix to this brief the evidence showing the number of lug boxes of Emperor grapes going to make up a standard car.

At the hearing of this matter we will ask the Court for an order permitting said appendix to stand as a part of the transcript of record. Assuming that the Court will grant this motion, we will argue this matter on the merits.

The evidence shows that a carload of grapes runs all the way from 775 boxes to 1170 boxes.

Crane testified that the standard car as he recalled it was 1106 lugs under O.D.T. ruling. [Appendix p. 1.]

Kazanjian testified that the minimum load was 889 or 890 to 899 boxes and the maximum load was 1170 boxes but that 1100 boxes was the standard car, that the range would be somewhere between 1000 and 1100. [Appendix p. 1.]

Other evidence was to the effect that the cars would contain 1105 boxes. Appendix p. 2.]

We feel that under the evidence the Court is justified in accepting the assumed figure used by Denunzio of 1100 lug boxes to a standard car of Emperor grapes in September to December, 1944.

If there were to be 775 lugs in the cars in question Crane's commission would be $.0645 a lug. If there were

to be 1170 lugs in the cars in question Crane's commission would be $.0427 a lug.

If the cars in question were to contain 1100 lugs Crane's commission would be $.0454 a lug.

These figures cover the commission on a range of lugs contained in a car (from the lowest to highest) as shown by the evidence set forth in the Appendix, and in every instance the commission would carry the sales price to a point in excess of the ceiling.

The total price being paid by Denunzio to Kazanjian and his agent Crane was, therefore, $2.50+.0454 or a total of $2.5454 per lug.

Denunzio further states that if Crane desired to prove that his commission would make the price paid exceed the ceiling "he was duty bound to submit evidence showing the number of crates that it was understood would be shipped in each of the three cars or * * * This he did not do." (Denunzio's Br. p. 17.)

We submit that we fully and fairly met the issue as to the number of lugs in a standard car and the price Denunzio agreed to pay per lug ($2.5454) and that our evidence showed illegality of the contract in question.

The question of "adjustable pricing" referred to on page 17 of Denunzio's brief and the lack of evidence to show this case does not come within one of the exceptions cannot help Denunzio. The trial court determined the contract was void. Every presumption is in favor of the propriety of the judgment of the trial court and it is incumbent upon Denunzio to assume the burden of showing (1) the contract came within one of the exceptions provided for in the Act, and (2) that the trial court erred. This he did not do.

Answer to Point V.

Under this point Denunzio contends that the contract in question could not exceed O.P.A. price regulations by more than six one-hundredths of one per cent.

In support of this argument Denunzio uses the figure 1100 as the number of lugs in the cars in question and the ceiling price as $2.53, and contends that the possible overcharge on the cars was only $17.00, which made a maximum possible overcharge of six one-hundredths per cent.

Using the car ceiling of $2.50 a lug and the figure of $.0454 a lug as Crane's commission, we find that the overcharge is 1.816% of the sale price of each lug. The commission of $50.00 a car exceeded the ceiling. The question as to the amount of overcharge is immaterial.

We are at a loss to know why Denunzio presents this question unless it is in support of the doctrine of *de minimis, non curat lex.*

In the case of *Porter v. Rushing,* 65 Fed. Supp. 759, the District Court dismissed the complaint in an action for damages and injunction where the excess rental charge was $1.00 a month. In reversing this ruling the Circuit Court stated:

> "* * * The courts are not vested with discretion either to deny enforcement or withhold the statutory remedies provided by Congress."

In view of the fact that the Emergency Price Control Act and Maximum Price Regulations were adopted to "stabilize prices" "in the interest of National defense and security" and for the "effective prosecution of the present war" (U. S. C. A. Sec. 901(a)), it is clear that the *de minimis* doctrine would not apply. It was a matter of public concern to keep prices down.

Answer to Point VI.

Under this point Denunzio contends that the Emergency Price Control Act sets forth the penalties for its violation and that such penalties do not include unenforceability of a contract in violation thereof.

It is the contention of respondent that the contract in question, being for the sale and purchase of grapes at a price in excess of the O.P.A. ceiling, is illegal and void.

The Emergency Price Control Act provides that it is in the interests of national defense and security and necessary to the effective prosecution of the present war, and that the purposes of said Act are to "stabilize prices" (Sec. 901(a)).

The Act empowers the Price Administrator to establish maximum prices (Sec. 902).

Section 904(a) provides:

> "It shall be unlawful, regardless of any contract, agreement, lease or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, * * * or otherwise to do or omit to do any Act in violation of any regulation or order under Section 2 * * * or of any price schedule effective in accordance with the provisions of Section 206 * * * or of any regulation * * * or to offer, solicit, attempt, or agree to do any of the foregoing."

Section 921(a) provides for the creation of the Office of Price Administrator and subdivision (d) provides: "The Administrator may, from time to time issue such regulations and orders as he may deem necessary or proper

in order to carry out the purposes and provisions of this Act."

Section 925(a) authorizes the Administrator to apply to the courts to enjoin violations of the Act and authorizes injunctions.

Subdivision (b) authorizes fines and imprisonment for violation of the Act.

Subdivision (c) confers jurisdiction upon the District Court in the criminal proceedings for violation of Section 4 of the Act and concurrent jurisdiction with all other proceedings.

Subdivision (d) precludes damages and penalties when persons act in good faith.

Subdivision (e) authorizes purchasers of commodities sold in violation of the regulations to bring actions against the seller on account of overcharge and authorizes recovery of three times the overcharge, and also authorizes the Administrator to sue where the purchaser does not sue.

Subdivision (f) confers certain powers on the Administrator.

Subdivision (g) authorizes the District Court to enjoin orders of the Administrator.

Maximum Price Regulation 426 (Fed. Reg. 1943, pp. 16409-11) contains the following provisions:

> "Sec. 7. Prohibition Against Sales Above Maximum Prices.
>
> On and after July 20, 1943, regardless of any contract or other obligation, no person shall sell or deliver, and no person, in the course of trade or business shall buy or receive fresh fruits and vegetables at prices higher than the maximum prices established by this

regulation, and no person shall agree, offer, solicit, or attempt to do any of the foregoing. Lower prices than the maximum may be charged and paid.

* * * * * * * *

Sec. 9. ENFORCEMENT. Persons violating any provisions of this regulation are subject to criminal penalties, civil enforcement actions, suits for treble damages and proceedings for suspension of licenses provided for by the Emergency Price Control Act of 1942, as amended.

* * * * * * * *

Sec. 11. EVASION. The price limitations which are set forth in this regulation shall not be evaded, whether by direct or indirect methods, in connection with any offer, solicitation, agreement, sale, delivery, purchase or receipt of or relating to fresh fruits or vegetables alone or in conjunction with any other commodity, or by way of commission, service, transportation or any other charge or discount, premium or other privilege, or by tying-agreement or other trade understanding or otherwise."

It will be remembered that Denunzio had agreed to pay a total price of $2.5454 a lug, whereas the ceiling price established under Amendment 46 to MPR 426 was $2.50 a lug for the purchase of said grapes in a sale made by Kazanjian, as a grower-packer, or by Crane as an unpaid or unsalaried agent for Kazanjian or by Crane as a car-lot distributor (see answer to Point I).

The general rule with reference to illegal contracts and the effect of illegality is set forth in 12 Am. Jur. p. 652, *et seq.*, as follows:

"It is a general rule that an agreement which violates a provision of a Constitution or of a constitu-

tional statute or which cannot be performed without violation of such a provision is illegal and void. In this respect there is no distinction between statutes and ordinances. This is the general rule whether the consideration to be performed or the act to be done is unlawful. Thus, a promise made in consideration of an act which is forbidden by the United States Constitution is illegal. An agreement in violation of a law is illegal whatever may have been theretofore decided by the courts to have been the public policy of the country on the subject." (Sec. 158.)

"So far as contracts in violation of statute are concerned, it may be said, speaking generally, that there is no distinction between acts *mala in se* and acts *mala prohibita.* Where a statute intends to prohibit an act, it must be held that its violation is illegal, without regard to the reason of the inhibition, to the morality or immorality of the act, or to the ignorance of the parties as to the prohibiting statute. It is equally unfit that a man should be allowed to take advantage of what the law says he ought not to do, whether the thing is prohibited because it is against good morals or because it is against the interest of the state. It is not necessary that a prohibited evil should be criminal in order to vitiate an agreement made in furtherance of that evil. According to some authorities, however, a distinction is made between acts which are *mala in se,* which are generally regarded as absolutely void, in the sense that no right or claim can be derived from them, and acts which are *mala prohibita,* which are void or voidable, according to the nature and effect of the act prohibited." (Sec. 159.)

"An agreement directly and explicitly prohibited by a constitutional statute in unmistakable language is ordinarily void and no recovery can be had thereon.

When a contract, express or implied, is tainted with the vice of violation of law as to the consideration or the thing to be done, no alleged right founded upon it can be enforced in a court of justice. Moreover, where one of the parties thereto has performed in whole or in part, he cannot avoid the contract and recover reasonable compensation.

It makes no difference whether the prohibition or command is expressed or implied. Even where the statute does not, in express terms, declare the act unlawful, yet if it appears, from a consideration of the terms of the legislation in question that the legislative intent was to declare the act unlawful, an agreement involving the doing of such an act is illegal. * * *" (Sec. 160.)

In the case of *Morgan Ice Co. v. Barfield* (Tex. Ct. of Civil Appeals 1945), 190 S. W. 2d 847, plaintiff sought to recover damages for the failure of defendant to deliver ice pursuant to an agreement of sale. The sales price was in excess of the O.P.A. ceiling. On appeal the Court held that the contract in question "was in violation of and prohibited by the Federal statutes and directives of the Office of Price Administration and, therefore, illegal and void." In denying recovery the Court quoted from Section 904(a) of the Emergency Price Control Act and then stated:

"The rule is, both under the Federal and State authorities, that where parties who are charged with the knowledge of the law (the Act above referred to and the rulings and ceiling prices fixed pursuant to its provisions constitute the law), undertake to enter into a contract in violation thereof they will be left in the position in which they put themselves. The courts will not permit a recovery to either side. (Cit-

ing cases.) Before appellee would be permitted to recover damages for the breach of a contract the duty rested upon them to establish a legal contract.

When the evidence shows the contract relied upon by a party is prohibited by law and therefore illegal, the courts are duty bound to dismiss such controversy, thereby denying relief to either party."

In the case of *Walker v. Jones* (Ala., 1947), 34 So. 2d 608, Jones sought to recover damages for sale of an auto in excess of O.P.A. ceiling. The syllabus contains the following with reference to instructions which were refused:

"In action to recover damages for overceiling sale of automobile, charge that, if one of defendants received part of excess purchase price paid by plaintiff, other defendants would not be liable for such excess, was properly refused as not correctly stating the law."

So far as we have been able to ascertain the two cases above referred to are the only ones dealing with actions for damages by a purchaser for breach of a contract to sell merchandise in excess of an O.P.A. ceiling. There are many cases where other phases of contracts for the sale of merchandise in excess of O.P.A. ceiling have been considered by the courts.

In the following cases the United States Supreme Court approved the granting of an injunction to enjoin sales in violation of the Maximum Price Regulations:

United States v. Lutz, 142 F. 2d 985;

Case v. Bowles (1945), 327 U. S. 92, 90 L. Ed. 552.

In the case of *Hulbert and Bowles v. Twin Falls County* (1946), 327 U. S. 103, 90 L. Ed. 560, the Court held that a County could not enforce a contract to sell merchandise at a price in excess of O.P.A. ceiling, relying upon the case of *Case v. Bowles, supra,* as its authority.

In the case of *Walker v. Bailey* (Ala., 1947), 33 So. 2d 891, the Court considered an action to recover possession of an automobile and money due on a chattel mortgage. Defendant contended the price of the automobile was in excess of O.P.A. ceiling. A subterfuge transaction had been worked out whereby part of the purchase price was paid to the plaintiff (a motor company which was selling the automobile for the owner), and the balance of the purchase price was paid to certain individuals who the Court found to be agents of the motor company. The Court stated:

> "In our opinion it is clear that under the provisions set out above that the mortgage and note which are the basis of this suit are illegal and void. The contract calling for the payment of a price above the O.P.A. ceiling is declared unlawful. A penalty is fixed for such actions. A prohibition must be implied under such conditions (citing cases). Contracts specially prohibited by law, or the enforcement of which violates the laws enacted for regulation and protection of private citizens are void and non-enforceable in the courts of this state (citing cases).
>
> Appellant's counsel contends strenuously that because of the recent United States Supreme Court decision in the case of *Bruce's Juices, Inc. v. American Can Company* * * * and in view of action for treble damages given the purchaser of over ceiling priced commodities under Section 925(c) that contracts violative of Emergency Price Control Act should be enforced in full and the victimized purchaser

left to his remedy under Sec. 925(c) *supra*. The fact that the purchaser is granted in a separate section a right to, and may, if he chooses, attempt to collect damages, where he is the victim of a sale involving over ceiling prices can in no way operate to validate a contract specifically declared unlawful by the act prohibiting such contracts. The expressed purpose and provisions of the Emergency Price Control Act we think establishes beyond argument the illegality of contracts made in violation of its provisions. Relief sought under contracts unlawful under the Emergency Price Control Act has uniformly been denied in other jurisdiction" (citing cases).

The Supreme Court of Alabama denied a review of the foregoing case (33 So. p. 898).

In the cases of *Gales v. Wallace* (Ark., 1946), 194 S. W. 2d 881, *Scott Furniture Co. v. Maurer* (Ark., 1945), 187 S. W. 2d 185, and *El Paso Furniture Co. v. Gardner* (Texas), 182 S. W. 2d 818, plaintiffs sought to recover possession of personal property sold on a title retaining contract—the sale price being over O.P.A. ceiling. In each instance the purchaser had paid under the contract an amount equaling or in excess of ceiling. In each case the Court held plaintiffs were not entitled to any relief.

In the case of *Lewis v. Jackson* (Texas, 1947), 199 S. W. 2d 853, plaintiff sought to recover possession of an auto sold in excess of O.P.A. ceiling. Plaintiff had taken back a chattel mortgage for a part of the purchase price. The Court held the transaction to be void. The Court further held that by refusing to enforce such a contract it did not thereby add a penalty in addition to penalty prescribed by Act of recovery of three times the overcharge (syllabus).

In the case of *Blumenthal v. U. S.,* 332 U. S. 539, 68 S. Ct. 248, 92 L. Ed. 154, the Court sustained the conviction of four individuals on a charge of conspiracy to violate the Emergency Price Control Act and regulations thereunder by selling liquor at over-ceiling prices. In this case the purchaser paid the ceiling price for certain whiskey directly to the Francisco Distributing Company, as ostensible agent for the owner, and in addition thereto paid various intermediaries who were apparently working in conjunction with the Francisco Distributing Company. Regardless of the fact that the owner or his agent only received the ceiling price, the Court sustained the conviction of all the defendants for conspiracy to violate the O.P.A. ceiling.

In the case of *MacRae v. Heath,* 60 Cal. App. 64, 212 Pac. 228, the Court considered the question of validity of a contract for sale of frozen fruit. The law made it unlawful to sell frozen fruit. With reference to the right to recover for frozen fruit sold and delivered to the purchaser, the Court stated the rule as follows:

> "* * * The fruit, for the full contract price of which plaintiff had judgment, was all delivered later, when its condition was substantially known to all. Under such circumstances plaintiff cannot have the aid of the court to enforce his contract. The illegality of the sale consummated by his own act, delivery of the fruit, precludes a recovery by him of the contract price. The sale is void, not because it is contrary to public morals or founded on an immoral consideration, but because the statute expressly declares it so."

In the case of *Takeuchi v. Schmuck,* 206 Cal. 782, 276 Pac. 345, the plaintiff sought to recover certain money paid as a deposit on account of the purchase price of real prop-

erty. The Court denied any recovery on the ground that the attempted purchase was in violation of the Alien Land Law and illegal.

In the case of *Silverthorne v. Percey,* 120 Cal. App. 83, 71 P. 2d 746, plaintiff sought to recover a broker's commission for negotiating an exchange of real property. The agreement for the exchange of real property was illegal, as it was an attempt to sell a parcel of property by reference to an unrecorded map. The Court held that the plaintiff was not entitled to recover a commission for negotiating an illegal contract of sale.

In the case of *Kings, etc. v. Yucaipa, etc.,* 18 Cal. App. 2d 47, 62 P. 2d 1064, the Court held that the contract to store perishable commodities at a price less than the tariff filed with the Railroad Commission was illegal, the law expressly forbidding such contracts, and making them illegal and void. The Court denied any recovery for the warehouse charges, and denied recovery by the party storing the merchandise for claimed negligence in handling the merchandise in storage.

Clearly under the foregoing authorities the sale in question was a sale in direct violation of a ceiling price established under a valid regulation and was void.

Cases Relied Upon by Denunzio to Defeat Claim of Illegality.

In opposition to Crane's contention of illegality of contract—that no recovery can be had on an illegal contract—Denunzio relies upon three cases as sustaining the right of recovery on illegal contracts, one involving a sale in excess of price regulations and the other cases being in violation of the law.

The first case relied upon by Denunzio is the case of *Miller v. Long Bell Lumber Co.* (Texas, 1949), 222 S. W. 2d 244, which was an action on an open account to recover $12,906.17 for goods, wares and merchandise sold and delivered. Miller alleged in his answer that he was not liable for the account by reason of the fact that the Long Bell Lumber Co. had charged higher prices than permitted under the Emergency Price Control Act. The jury found that the reasonable value of the goods after allowing certain credits, was $12,906.17, the amount sued for. From this verdict the Judge deducted $790.69, which he found to be the total sum charged by Long Bell in excess of the O.P.A. ceiling on 61 items of the account. On appeal Miller contended that the case should be governed by the rule that "Courts will not lend their aid in support of illegal contracts." The Court conceded this to be a rule well recognized by the courts. The Court thereupon considered the *Morgan Ice-Barfield* case and the case of *Lewis v. Jackson* hereinbefore referred to and stated:

> "In the instant case the sale of the merchandise in question was not illegal in itself. The illegality of the transaction, if any, consisted in the fact that an overcharge was made on certain specified articles of merchandise. The penalty in such case as provided by the statutes relating thereto, which hereinafter will be discussed, in the event the overcharge was not intentional is merely a return of the amount of such overcharge."

The Court held the overcharge to be unintentional and that the general rule as to nonenforceability of illegal contracts is not applicable.

Clearly the *Miller* case is not in conflict with the rule contended for by Crane. Here we have a case where the

plaintiff is relying upon an illegal contract to recover damages. In the *Miller* case the plaintiff was seeking to recover the reasonable value of the merchandise sold and delivered to the defendant and the defendant sought to avoid payment for the merchandise he had received on the theory that some of the merchandise was billed to him at a price in excess of ceiling.

The next case relied upon by Denunzio is the case of *Macco Const. Co. v. Farr,* 137 F. 2d 52. This was an action for damages brought by Farr against the Macco Construction Co. for breach of an oral contract whereby Farr agreed to furnish automobile trucks and equipment and personal services for the entire duration of an excavation contract which Macco was carrying on. Without pleading illegality of the contract in question Macco, at the trial, sought to prove its illegality by showing that Farr was not entitled to recover because he had not obtained a permit from the Railroad Commission of the State of California, permitting transportation of property by trucks over public highways. Farr contended that the contract did not require the use of public highways and that the dirt was to be moved wholly on private property. The evidence showed that Macco was to, and did, hire the truck drivers and directed their work. After reviewing the evidence the Circuit Court stated:

> "It is apparent that this contract was not entered into for any illegal purpose or with any understanding or intent to violate the law and hence is not *malum in se* * * *."

The Court held the contract to be valid and affirmed the judgment in favor of Farr on the theory that the contract did not contemplate an illegal object—that is the use of highways—in violation of the City Carrier's Act.

In the case of *Orlinoff v. Campbell,* 91 Cal. App. 2d 382, 205 P. 2d 67, appellant sought to have the Court apply the rule in the *Macco-Farr* case. In the *Orlinoff* case the contract contemplated the transportation of merchandise throughout Los Angeles County by the plaintiff, who did not have a permit to operate on the public highways under the Highway Carrier's Act. The Court held that the contract having as its object the transportation of merchandise over the public highways by a carrier who did not have a license, was a contract for an illegal object and the same was void and no recovery could be had thereunder. In refusing to apply the rule of the *Macco* case, the District Court stated as follows:

> "The principal holding in the case (Macco case), however, was that the operation of the contractors did not bring them within the scope of the act inasmuch as the work contracted for did not require the transportation of material on a public highway, and the minor use that was made of the highway in moving material was unsubstantial and purely incidental to the main operation. The language upon which plaintiff relies should not be given effect in circumstances differing essentially from those which the court had under consideration."

The next case cited by Denunzio is the case of *Bruce's Juices v. American Can Co.,* 330 U. S. 743, 91 L. Ed. 1219, which was an action to recover $114,000.00 upon certain promissory notes given for the purchase price of cans. Bruce alleged that the contract for the notes was illegal and that the notes were void, the alleged illegality consisting of the fact that the Can Company sold cans

to others at prices which discriminated against Bruce, thereby violating the Robinson-Patman Act. With reference to this defense of illegality, the Court stated that the Act did not prohibit all quantity discounts but expressly permitted same and that the Federal Trade Commission is the appropriate tribunal to hear and determine grievances growing out of quantity discounts and that until the Federal Trade Commission had determined the question that the courts were not given guidance as to what the public interest does require concerning same, and in denying Bruce's Juices the right to establish this defense, the Court stated:

> "Because of a more fundamental defect in petitioner's case, however, the Court does not find it necessary to consider the effect of these features of the Act on this case, as would be necessary before a conclusion could be reached that petitioner should win on the merits."

Clearly the *Bruce's Juices* case cannot be considered as an authority permitting recovery of damages for breach of an illegal contract. To apply the rule of illegality to the *Bruce's Juices* case would have had the effect of giving Bruce's Juices $114,000.00 worth of cans for nothing. Certainly the Court would not look with favor upon any such result.

Denunzio thereupon discussed cases involving the licensing statutes. The license statute cases are so far removed from the case at bar that we will not further discuss the matter.

Cases Involving the Sherman Anti-Trust Act.

We feel that the decisions under the Sherman Anti-Trust law furnish an analogy for allowing the defense of illegality under the Emergency Price Control Act.

The Sherman Anti-Trust law provides, among other things, that every contract in restraint of trade or commerce "is hereby declared to be illegal" (July 2, 1890) 26 Stat. 209, Chap. 646; (Aug. 17, 1947) 50 Stat. 673-93, Chap. 690; 15 U. S. C. A. Sec. 1, 4 F. C. A. Title 15, Sec. 1.

The Sherman Anti-Trust law further provides for the recovery of treble damages, incurred by virtue of alleged violation of the Sherman Act, Sections 1 and 2 (July 2, 1890) 26 Stat. 209, Chap. 647m; (Oct. 15, 1914) 38 Stat. 730, 731, Chap. 323; 15 U. S. C. A. Secs. 1, 2, 7, 15, 4 F. C. A. Title 15, Secs. 1, 2, 7, 15.

In the case of *Sola Electric Company v. Jefferson Electric Company,* 317 U. S. 173, 87 L. Ed. 165, the Jefferson Electric Company sought to recover certain royalty payments due under a license agreement covering a patented article. The petitioner, Sola Electric Company, contended that the patent was invalid for want of novelty and that therefore the agreement for licensing was in violation of the Sherman Anti-Trust law. In denying recovery the Court stated as follows:

> "* * * petitioner may assert the illegality of the price-fixing agreement and may offer any competent evidence to establish its illegality, including proof of the invalidity of the patent."

In the case of *Continental Wall Paper Co. v. Louis Voight, etc.,* 212 U. S. 227, 53 L. Ed. 486, petitioner sought to recover for goods, wares and merchandise sold

and delivered. Defendant alleged that the plaintiff was the selling agent of a combination of wall paper manufacturers and that in carrying out such combination the defendants were compelled to sign a jobber's agreement which in effect bound them to buy from the plaintiff all the wall paper needed in their business at certain fixed prices, and not to sell the same at lower prices or upon better terms than those upon which the plaintiff itself sells to dealers other than the jobbers. The defendant further alleged that the goods sued for were ordered pursuant to such agreement and at the prices fixed and that such prices were unreasonable and that the transactions between the parties were in furtherance of an illegal combination. In sustaining the defense the Supreme Court stated the rule as follows:

> "The present suit is not based upon an implied contract of the defendant company to pay a reasonable price for goods that it purchased, but upon agreements, to which both the plaintiff and the defendant were parties, and *pursuant to which* the accounts sued on were made out, and which had for their object and which it is admitted had directly the effect, to accomplish the illegal ends for which the Continental Wall Paper Company was organized. If judgment be given for the plaintiff the result, beyond all question, will be to give the aid of the court in making effective the illegal agreements that constituted the forbidden combination."

See also case of *Bement & Sons v. National Harrow Company,* 186 U. S. 70, 46 L. Ed. 1058.

The rule laid down in the Sherman Anti-Trust cases is clearly to the effect that a contract which violates the Act is unlawful and no action can be predicated thereon.

Answer to Point VII.

Under this point Denunzio contends that a court may use its discretion in applying the Emergency Price Control statutory remedies and may use its discretion in applying a remedy not called for by the statute.

The matter of discretion arises only in the case of an injunction where the court may take into consideration the fact that the defendant did not intentionally violate the Act.

The cases relied upon by Denunzio do not support a rule that the court may use its discretion and hold an illegal contract to be a legal contract.

Answer to Point VIII.

Under this heading Denunzio contends that the contract is severable and that the illegal portion may be severed and the legal portion enforced. In support of this argument counsel contends that (1) the contract was to pay Crane, as agent for Kazanjian, for the grapes, and (2) a supplemental contract provided for the payment of a commission to Crane, and that the supplemental contract was dependent upon the primary contract being performed and that Crane did not earn his commission until the grapes were sold by Kazanjian to Denunzio.

This is an ingenious argument but weakness of same lies in the fact that the contract had but one object—the purchase by Denunzio of three cars of grapes.

We fully recognize the California Civil Code provisions on the question of the object of the contract and the severance of an illegal object from a legal object and the enforcement of the legal object. There are many adjudicated cases supporting this rule. It is our contention, how-

ever, that the contract in question does not present a contract supported by a valid consideration and providing for a legal object and an illegal object.

The contract in question, so far as Denunzio was concerned, was to buy three carloads of grapes, and so far as Crane was concerned was to sell three carloads of grapes. The purchase was the counter-part of the sale and had but one object—the transfer of three carloads of grapes from Kazanjian to Denunzio. The consideration for this transfer was the payment to Kazanjian of $2.50 a lug, which was the ceiling, and the payment of Crane (agent for Kazanjian) of $.0454 a lug as a commission. The illegality, as we view this case, is illegality of consideration, that is, Denunzio agreed to pay the seller and his agent more than the law permitted as the consideration for the delivery of the grapes. The Legislature of California clearly recognizes the difference between illegality of consideration and illegality of object.

Chapter IV of Title 1, of Part 2, of Division 3, of the Civil Code treats with the matter of "Object of a Contract." Under this subject we find the following:

Section 1595 provides that:

> "The object of a contract is the thing which it is agreed, on the part of the party receiving the consideration, to do or not to do."

Section 1596 provides that:

> "The object of a contract must be lawful when the contract is made, * * *."

Section 1598 provides that:

> "Where a contract has but a single object, and such object is unlawful, whether in whole or in part, * * * the entire contract is void."

Section 1599 provides that:

> "Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest."

The contract in question had but one object—the purchase or sale of the grapes, dependent upon whether you refer to the buyer or seller. There is no other object disclosed by the contract.

The consideration for the purchase-sale of the grapes was the payment by Denunzio of more than the Maximum Price Regulations permitted. It is therefore a case of an illegal consideration.

Chapter V, Title 1, Part 2, Division 3, of the California Civil Code treats with the question of consideration for contracts and provides as follows:

Section 1605:

> "Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise."

Section 1606:

> "An existing legal obligation resting upon the promisor, or a moral obligation originating in some benefit conferred upon the promisor, or prejudice suffered by the promisee, is also a good consideration for a promise, to an extent corresponding with the extent of the obligation, but no further or otherwise."

Section 1608:

> "If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void."

We do not find under the title "Consideration" for a contract any section dealing with severability of consideration similar to that found under the title "Object of a Contract" dealing with severability of object. In fact, the sections above quoted lay down a rule diametrically opposed to severability of consideration.

The case at bar, as we view it, comes clearly within the inhibition of Section 1608, that is, a part of the consideration for the sale or purchase of grapes was the payment to Crane of a sum of money that carries the total consideration paid to seller and his agent to an amount in excess of the ceiling.

An examination of the cases dealing with the severability of the legal object from the illegal object will show that the case at bar does not involve a contract with two objects—one legal and the other illegal—but a contract with one object where the consideration is illegal.

The position taken by Crane above is borne out by the decision of the Court in the case of *Poultry Producers Assn. v. Barlow,* 189 Cal. 278, 208 Pac. 93 (a case relied upon by Denunzio). This case involved the formation of a Poultry Producers Association by various poultry producers who entered into a subscription agreement having as its object the formation of the Association. A producer's sale agreement was entered between by the Association and the various members under which the members agreed to sell their eggs to the Association. One of the provisions of the subscription agreement was to give the

Association an option to repurchase its stock from the members. It was conceded that this repurchase provision was illegal. The Court, in this case, held that all of the considerations moving from the corporation to the shareholders were legal, but that one of the objects to be performed for these legal considerations was an illegal act. Even though there was an illegal act or object contemplated by the subscription agreement, the Court held that the produce sales agreement was valid and that the defendant was responsible in damages for failure to carry out this part of the agreement.

The *Poultry Producers* case clearly recognizes the necessity of a valid and legal consideration as the basis of the object of the contract.

The other case relied upon by Denunzio is the case of *Hedges v. Frink,* 174 Cal. 552, 163 Pac. 884. This was not an action for damages for breach of contract, a part of which was illegal, but an action on a promissory note, the giving of which was not involved in any particular in the illegal object. By reason of the apparent insolvency of a corporation an agreement was entered into whereby one of the creditors took over all the assets of the corporation except certain promissory notes and underwrote the obligations. It was agreed that the various promissory notes (including the one sued on) would be turned over to a trustee and the trustee could enforce the collection of the notes, and after the same had been collected the money so received would be distributed among the shareholders. The Court held that the provision of the contract for distribution of assets among the shareholders was illegal, but that the provision for the collection of the notes was legal because when the notes were collected the trustee would hold the money so received as trustee for the cor-

poration and that this object of the contract was perfectly valid.

In the case of *Endicott v. Rosenthal,* 216 Cal. 721, 16 P. 2d 673, the Court considered an action brought by plaintiff to recover a commission on the gross business done by defendants over a certain period. Under the contract in question defendants had hired plaintiff as a business counselor and advisor. Plaintiff had been instrumental in forming an association of dry cleaning plants (of which defendant was a member) under an agreement fixing prices. The association hired plaintiff, by a separate contract, as advisor to the association and the expenses incurred for the benefit of the association were to be paid out of the money paid by the members on their separate contracts. All members entered into separate contracts similar to the contract sued upon.

Defendant claimed the contract to be invalid as one in restraint of trade. Plaintiff contended that the illegal contract between the association members to fix prices could be severed from the contract sued upon. In ruling upon this point the Court said:

> "* * * The contract with the association and those with the individual members called for the same service to be performed by appellant. Among other things those services included price raising and eliminating competition. While portions of said contracts may be said to be legal, they are so interwoven with the illegal parts that they cannot be separated."

In the case of *Santa Clara Mill & Lumber Co. v. Hayes,* 76 Cal. 387, 18 Pac. 391, the plaintiff sought to recover damages for breach of contract. Both parties were engaged in the manufacture of lumber, and in the agreement in question Hayes agreed to sell the Lumber Company a

certain quantity of lumber during a given period and in addition thereto Hayes agreed not to manufacture lumber to be sold during said period in four counties in the State of California, except under contract to the Lumber Company and to pay the Lumber Company $20.00 per 1000 feet for any lumber manufactured and sold to parties other than the Lumber Company. The trial court found that the object of the contract in question was to form a combination to increase prices of lumber. The Lumber Company contended that the contract had two objects—the first being an agreement to sell lumber by Hayes to the Lumber Company, and the other purpose being not to sell lumber to persons other than the Lumber Company, and that the two objects could be separated and the agreement to sell enforced even though the agreement not to sell was unenforceable. With reference to this contention the Court stated that the object was a combination to increase prices and "This being the inducement to the agreement, and the sole object in view, it cannot be separated and leave any subject-matter capable of enforcement * * *."

In the case of *Prost v. More,* 40 Cal. 347, plaintiff sought to recover on three promissory notes. Defendant alleged that the notes were executed in accordance with an agreement whereby he bought certain tools and equipment and the seller agreed to abstain from the business it had theretofore conducted. The total consideration for the transaction was $2,000.00. The tools and equipment were not of great value according to the pleadings. The trial court granted judgment on the pleadings and on appeal

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respondent contended that the valid portions of the contract could be separated from the invalid portions. With reference to this contention, the Court stated:

> "* * * The contract is evidently an entire contract, and therefore, being void in part, is entirely void and cannot be enforced. (Citing cases.) The contract is not one in which the good can be separated from the bad, and the part which is good enforced. There are no different valuations fixed for the merchandise, the good will, or for the covenant not to engage in business in California."

In the case of *More v. Bonnet,* 40 Cal. 251, the plaintiff sought to enforce a promissory note which was part of the consideration for an agreement whereby it sold its business and agreed not to engage in the same business in the City and County of San Francisco, or the State of California. The plaintiff contended that even though the contract not to engage in the same business in the State of California was void, that the contract was severable and the one relating to the City and County of San Francisco was valid. The Court held that the contract was an entire contract and the valid portion could not be separated from the invalid portion.

While none of the cases above referred to may be considered to be on all fours with the case at bar, still the reasoning of the Court as disclosed by its opinions, shows the proper application of the rule that permits the severance of illegal object of a contract from the legal object and the enforcement of the legal object. The rule as disclosed by these cases is, that where the legal object of the contract is so dependent on the illegal object that the contract would not have been entered into had it not been for the illegal object, then there can be no severance of the legal

object from the illegal object and an enforcement of the legal object.

It must be borne in mind in analyzing these cases that they are actions to enforce the provisions of a contract. We submit that in any action for damages for breach of contract where one of the objects is illegal, there can be no severance because there can be no determination as to whether either of the parties depended upon the illegal object as one of the considerations for the legal object.

Conclusion.

In conclusion we submit that in view of the finding of the trial court to the effect that Crane was not a buying broker for Denunzio but was agent for the seller, the contract in question to pay the seller the ceiling price for grapes and to pay his agent a commission which brought the sale price to an amount in excess of ceiling, was illegal and could not be the basis of an action for damages for failure of the seller or his agent to deliver in accordance with the alleged contract.

Respectfully submitted,

HENRY O. WACKERBARTH,

Attorney for Appellee Raymond M. Crane, Doing Business as Associated Fruit Distributors of California.

APPENDIX.

RAYMOND M. CRANE

(called as a witness for respondent Crane) testified on direct examination by Henry O. Wackerbarth as follows [Rep. Tr. p. 14]:

"Q. Mr. Crane, do you know what the standard car of grapes, Emperor grapes, contained as to number of boxes, as of December 10th; also September and October 1944? A. Well, we had an O.D.T. ruling at that time. The increased load, as I recall it, was 1106 lugs.

Q. And that was a standard car? A. Yes." [Rep. Tr. p. 52, lines 9 to 15.]

JOHN C. KAZANJIAN,

respondent (called as a witness for respondent Crane), testified on direct examination by Henry O. Wackerbarth as follows [Rep. Tr. p. 83]:

"Q. As of October, December, and September 1944, was there such a thing as a number of lug boxes to a standard car of grapes? A. 890, to the best of my recollection; there were 899, I think, or 889 was the minimum load and the maximum load was about 1170.

Q. 1170. Was there any particular number as a standard car? A. Well, I would say about 1100 is the standard car.

Q. About 1100? A. I was packing 1040 that year. It depends on the type of loads you are making and the type of bracing material you are using." [Rep. Tr. p. 90, line 25, to p. 91, line 13.]

* * * * * * * * *

"The Court: Do you mean 1100 boxes in a car?

The Witness: I did not get you.

The Court: Do you mean 1100 boxes in a car?

The Witness: Yes, about 1105 is one load we make. We make another one of 1070. We make another one of 1040." [Rep. Tr. p. 92, lines 2 to 6.]

On cross-examination he testified as follows [Rep. Tr. p. 93, line 17]:

"Q. Then, you refer to the number of lugs in a car. Ordinarily in the trade, unless it is expressed otherwise, a standard car would be how many lugs?

* * * * * * * *

A. I would say between 1,000 and 1100." [Rep. Tr. p. 94, lines 6, 7, 8 and 15.]

MARK DENUNZIO,

called as a witness for complainant [Rep. Tr. p. 100], stated with reference to car URTX purchased by complainant on October 30, 1944, as follows:

"Q. By Mr. Wackerbarth: And how many boxes in that car? A. This doesn't show here. The rest of the papers, that should be attached here. But it should be approximately 1100 or 1105." [Rep. Tr. p. 167, lines 13 to 17.]

JOHN S. ARENA,

called as a witness for complainant [Rep. Tr. p. 186], testified with reference to six cars of Emperor grapes which his company shipped between December 27, 1944 and January 19, 1945, that each of them contained 1105 boxes [Rep. Tr. p. 189, line 24, to p. 193, line 23].

A. B. RAINS,

a witness for complainant, testified by deposition [Rep. Tr. p. 227] as follows:

"Q. In buying and selling grapes by the carload lot, how many lugs are considered a standard carload? How many lugs are in a minimum load? A. 1125 lugs are considered a standard carload. Approximately 775 lugs are in a minimum load.

Q. According to the custom and usage of the trade, when a contract calls for a carload of grapes, is it understood to mean a standard load unless otherwise designated? A. Yes." [Rep. Tr. p. 244, line 25, to p. 245, line 8.]